UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

GERARD T. OUIMETTE,

Defendant-Movant,

v. Case No. 99-489-T

UNITED STATES OF AMERICA.

Plaintiff-Respondent.

DEFENDANT-MOVANT'S MOTION TO REOPEN 2255 PROCEEDINGS
PURSUANT TO FED.R.CIV.P. 60(b)(6)

NOW COMES GERARD T. OUIMETTE the defendant-movant pro se and pursuant to Fed.R.Civ.P. 60(b)(6), respectfully moves this Honorable Court to reopen the 28 USC § 2255 proceedings in this case. In support thereof, defendant-movant ("movant") states as follows:

Case Background:

A jury found petitioner guilty of conspiracy to collect extensions of credit by extortionate means, and of aiding and abetting the collection of extensions of credit by extortionate means. Petitioner was sentenced to concurrent terms of life imprisonment without parole pursuant to the "three strikes" provision of 18 U.S.C.S. § 3559(c)(1)(A). Petitioner moved to vacate, set aside, or correct sentence under 28 U.S.C.S. § 2255.

On June 21, 2001, petitioner's motion to vacate, set aside, or correct his sentence was denied because petitioner was procedurally barred from making his claims of trial error, and his claims of sentencing error were foreclosed by U.S. Supreme Court precedent." See attached copy of Memorandum and Order, Ex. A.

Movant now moves this Honorable Court to reopen his previously dismissed Section 2255 proceeding as provided for under Fed.R.Civ.P. 60(b)(6) based on a recent decision of the United States First Circuit Court of Appeals[1/], a decision that squarely addresses a claim that was brought in the original § 2255 motion to vacate, set aside, or correct sentence, but a decision on the merits of the claim was never reached by Court.

Legal Principles

Rule 60(b) of the Federal Rules of Civil Procedure provides in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party... from a final judgment... for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud..., misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been

Footnote 1/ Dwayne Owens v. United States of America, 2007 U.S. App. LEXIS 8388 (1st Cir. Apr. 12, 2007). See Ex. B

> satisfied, released, or discharged,... or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

The First Circuit has addressed the use of Rule 60(b) motions by federal prisoners in connection with attempts to reopen judgments dismissing their § 2255 petitions, concluding that:

> A motion made under Rule 60(b) of the Federal Rules of Civil Procedure for relief from a judgment previously entered in a section 2255 case "should be treated as a second or successive habeas petition if -- and only if -- the factual predicate set forth in support of the motion constitutes a direct challenge to the constitutionality of the underlying conviction." If, however, "the factual predicate set forth in support of the motion attacks only the manner in which the earlier habeas judgment has been procured, the motion may be adjudicated under the jurisprudence of Rule 60(b)." Munoz v. United States, 331 F.3d 151, 152-153 (1st Cir.2003). quoting Rodwell v. Pepe, 324 F.3d 66 (1st Cir. 2003)(same, as to habeas petition under 28 U.S.C. § 2255).

A motion filed pursuant to F.R.Civ.P. 60(b) only lies to challenge a civil judgment, including a judgment entered in a postconviction proceeding initiated pursuant to 28 U.S.C. § 2254 or 2255, which are deemed civil proceedings.

This motion first contests a procedural irregularity in the procurement of the judgment dismissing the original § 2255 motion at issue here.

Specifically, movant made a claim that he was effectively prevented from testifying in his own defense[2/].

2/ Movant is unable to reiterate verbatim the actual claim made in the original § 2255 because he currently does not possess a copy of the motion. A

This Court failed to address the aforementioned issue and did not enter a judgment on the merits.

Owens Decision:

The First Circuit Court of Appeals recently held in **Owens v. United States**, inter alia:

"It is clear that a defendant has a 'fundamental constitutional' right to testify in his own defense, (citations omitted) and that the right 'must be unfettered' (citations omitted). The right to testify may not be waived by counsel acting alone. (Citations omitted). Where counsel has failed to inform a defendant of his right to testify, we do not believe that a waiver of that right may be implied from defendant's silence at trial; 'at trial defendant's generally must speak only through counsel, and, absent something in the record suggesting a knowing waiver, silence alone cannot support an inference of such a waiver"'. (Citations omitted).

"A lawyer plays the primary role in advising his client of the right to testify; a trial judge is not required to apprise a defendant of his right to testify or inquire whether he has waived it. (citations omitted). The district court correctly noted that [ABA] Standard for Criminal Justice 4-5.2(a), Model Rule of Professional Conduct 1.2(a), ... require counsel to consult with defendant's regarding their right to testify. (Citations omitted). Given these obligations, it becomes difficult to explain away counsel's failure to inform client of his right to testify as trial strategy. (Citations omitted). Furthermore, given the paramount importance of the right to testify and the small amount of time that would be required to inform the defendant of that right, we do not believe counsel's failure can be classified as an inconsequential slip". (Citation omitted).

We also agree with the district court that an attorney's failure to inform his client of his right to testify could be prejudicial. A defendant's testimony could be crucial in any trial, and it could be difficult for us to determine whether or not a jury would have found his testimony credible. (Citation omitted).

2/ Continued copy of the document is being ordered from the clerk's office and will need to be retrieved from the Federal Archives. In an effort to meet the 1-year statute of limitations period imposed under **Dodd v. United States**, 162 L.Ed.2d 343 (2005)("The 1-year limitations period...begins to run on the date which [the] court "initially recognized" the right asserted in an applicant's motion), this motion is being made invoking the claim originally made in the §2255 motion related to being denied his right to testify in his defense and the recent decision in **Owens v. United States**, 2007 U.S. App. LEXIS 8388 (Ex. A). Therefore, this claim is clear and sufficiently sets forth movant's federal based claim with particularity. See Fed.R.Civ.P. 81(a)(2), 10(c); **Dye v. Hofbauer**, U.S. Supreme Court, No. 04-8384 (Dated 10/11/05).

"Although Owens makes no allegation that his trial counsel directly barred him from testifying, the failure to inform Owens of his right to testify would have effectively prevented him from doing so. As we noted before, defendants speak to the court through counsel. (Citation omitted). If counsel refuse or fail to request that the defendant be allowed to testify, the defendant will not be able to speak in his defense. If counsel decline to put their client on the stand without any consultation regarding this decision, and the client is unaware that the right to testify exists, the client will be barred from doing so and thus will have effectively waived his right to testify. However, "there can be no effective waiver of a fundamental constitutional right unless there is an "intentional relinquishment or abandonment of a known right or privilege."" (Citation omitted). Thus, if Owens was unaware of his right to testify and his attorneys did not ask him whether he wanted to testify, Owens was effectively barred from testifying in his own defense."

The Second Circuit found that counsel's failure to inform the defendant of his right to testify was not prejudicial in Brown v. Artuz, 124 F.3d 73, 80 (2d Cir. 1997). We agree with the court in Brown that where the defendant would have testified only "to demonstrate that the prosecution failed to disprove his defense of justification beyond a reasonable doubt," there is a weaker argument that the defendant was prejudiced by not testifying. Id. at 80-81. However, Owens claims that he would have offered testimony exculpating him from at least some of the crimes for which he was convicted. A defendant's testimony as to non-involvement should not be disregarded lightly, especially given his constitutional right to explain his version of the facts.

As such, we conclude that if Owens was not informed by counsel of his right to testify in his own defense, was not otherwise informed of the right by the court, and would have offered genuinely exculpatory testimony, the failure of counsel to inform Owens of his right to testify would be prejudicial." Id. Ex. ~~A.~~ B

This Court's failure to enter a judgment on the merits of movant's claim that he was effectively prevented from testifying in his own defense makes it logical that the instant Rule 60(b) motion is not a second or successive 2255 petition. Specifically, movant points to Esposito v. United States, 135 F.3d 111, 113, (2nd Cir.1997). Further, the AEDPA amended the habeas statutes to provide that a petitioner seeking to file a "second or successive" habeas petition in the district court must first apply to the appropriate court of appeals for an order authorizing the district court to consider the petition. See AEDPA § 106(b), 28 U.S.C. § 2244(b)(3)(A) (West Supp.1997); AEDPA § 105, 28 U.S.C. § 2255 para. 7 (West Supp.1997). The circuit court's role as gatekeeper is to certify only the "second or successive" section 2255 petitions that contain:

> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable fact-finder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

AEDPA § 105, 28 U.S.C. § 2255 (West Supp.1997).

As noted in Camarano v. Irvin, 98 F.ed 44 (2d Cir.1996)(per curiam), the Supreme Court in Felker v. Turpin, 518 U.S. 651, 116 S.Ct. 2333, 135 L.Ed.2d 827 (1996), "upheld these new gatekeeping provisions which it believed to be within the mainstream of the evolving jurisprudence designed to curb abuse of the writ." Camarano, 98 F.3d at 45.

Although the AEDPA sets standards for the authorization of second or successive applications, it does not provide a definition of the phrase "second or successive". Id. at 45-46. Generally, we look to "abuse of the writ" jurispurudence to inform that wording.

Rule 60(b) of the Federal Rules of Civil Procedure for relief from a judgment, is not to be treated as a second of successive federal habeas corpus petition - which of course would be subject to the restrictions on such petitions in 28 U.S.C.S. §2244(b), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) - if the motion does not assert, or reassert, claims of error in the movant's conviction, as for such purposes:

(1) The policy consideration of finality, standing alone, is unpersuasive in the interpretation of Rule 60(b), whose sole purpose is to make an exception to finality.

(2) When no "claim" is presented within the meaning of §2244(b), there is no basis for contending that a Rule 60(b) motion should be treated like a habeas corpus application.

(3) If neither a Rule 60(b) motion, nor the federal judgment from which the motion seeks relief, substantially addresses federal grounds for setting aside the movant's state conviction, then allowing the motion to proceed as denominated creates no inconsistency with the federal habeas corpus statute or rules.

(4) Rule 60(b) has a valid role to play in federal habeas corpus cases.

(5) Several characteristics of a Rule 60(b) motion limit the friction between Rule 60(b) and the successive petition prohibitions of AEDPA, and thus the harmonization of Rule 60(b) and AEDPA will not expose federal courts to an avalanche of frivolous post-judgment motions.

CONCLUSION

Wherefore all premises considered, movant prays that this Honorable Court reopen the 2255 proceedings based on the recent holdings in Owens v. United States, and after consideration of said case a decision on the merits is reached.

Respectfully submitted,

4-2-08
Date

Gerard T. Ouimette

Certificate of Service

I, the undersigned, do swear and affirm that I placed a true copy of the foregoing motion into the USP Terre Haute legal mail depository, with full postage fully prepaid and affixed and addressed to the following:

U.S. Attorney
Robert Clark Corrente
Fleet Center, 8th Fl.
50 Kennedy Plaza
Providence, RI 02903

4-2-08
Date

Gerard T. Ouimette
Pro Se